

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NGM INSURANCE COMPANY,

Plaintiff,
-against-

CROSS-NOTICE OF
MOTION FOR
SUMMARY JUDGMENT

BLAKELY PUMPING, INC. d/b/a ASSENTIAL PUMPING,
BRIAN J. BLAKELY, PETER J. SLINGERLAND, NANCY]
SLINGERLAND and PROGRESSIVE CASUALTY
INSURANCE COMPANY,

Docket No.
07-CV-6517

Defendants.
-----X

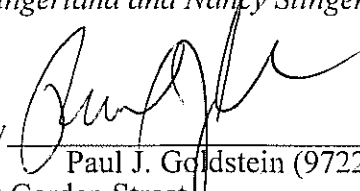
Hon. Charles L. Brieant

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affirmation of PAUL J. GOLDSTEIN, dated the 7th day of April, 2008, and upon all pleadings and proceedings heretofore had herein, the undersigned will move this Court before The Honorable Charles L. Brieant, at the United States District Court for the Southern District of New York, in Room 218 at the Courthouse located at 300 Quarropas Street, White Plains, New York, on the 2nd day of May, 2008, or as soon thereafter as counsel can be heard for an Order pursuant to F.R.C.P. §56 granting defendants, Peter J. Slingerland and Nancy Slingerland, summary judgment, and for such further and other relief that this Court deem just and proper.

Dated: Poughkeepsie, new York
April 7, 2008

GOLDSTEIN & METZGER, LLP
Attorneys for Defendants, *Peter J.
Slingerland and Nancy Slingerland*

By 
Paul J. Goldstein (9722)
40 Garden Street
Poughkeepsie, New York 12601
Tel. 845/473-7000

- TO: BRILL & ASSOCIATES, P.C.
Attorneys for Plaintiff
111 John Street, Suite 1070
New York, NY 10038
- TO: COOK, NETTER, CLOONAN, KURTZ & MURPHY, P.C.
Attorneys for Blakely Pumping, Inc. d/b/a Assential Pumping, Inc, and Brian J. Blakely
85 Main Street, PO Box 3939
Kingston, NY 12402
- TO: PROGRESSIVE CASUALTY INSURANCE COMPANY
c/o New York State Superintendent of Insurance
25 Beaver Street
New York, NY 10006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NGM INSURANCE COMPANY,

Plaintiff,

-against-

BLAKELY PUMPING, INC. d/b/a ASSENTIAL PUMPING
BRIAN J. BLAKELY, PETER J. SLINGERLAND, NANCY
SLINGERLAND and PROGRESSIVE CASUALTY
INSURANCE COMPANY,

Defendants.
-----X

AFFIDAVIT IN
OPPOSITION TO
PLAINTIFF'S MOTION
FOR SUMMARY
JUDGMENT AND IN
SUPPORT OF CROSS-
NOTICE OF MOTION
FOR SUMMARY
JUDGMENT

Docket No.
07-CV-6517

STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHES)

PAUL J. GOLDSTEIN, being duly sworn, deposes and says:

1. I am a member of GOLDSTEIN & METZGER, LLP, attorneys for defendants, Peter J. Slingerland and Nancy Slingerland, and submit this affidavit, the annexed exhibits, and the accompanying Memorandum of Law, in opposition to plaintiff's motion for summary judgment, and in support of defendants', Peter J. Slingerland and Nancy Slingerland, motion for summary judgment.

2. A Response to Statement of Undisputed Facts pursuant to Local Rule 56.1 is submitted herewith along with a Memorandum of Law. The following exhibits are annexed:

Exhibit 1 - Affidavit of Peter J. Slingerland, sworn to on April 3, 2008;

Exhibit 2 - Police Accident Report, of November 3, 2005 accident.

3. The original underlying personal injury action was commenced on December 7, 2005, against Brian J. Blakely, only. (Ex. "B"). Alfred B. Mainetti, Esq., attorney for Blakely, forwarded the summons and complaint to the plaintiff, on January 3, 2006, requesting

coverage because Mr. Blakely was employed, and in the course of his employment, with Blakely Pumping, Inc., at the time of the accident. (Ex. "M").

4. On February 9, 2006, the pleadings were amended to include defendant, Blakely Pumping, Inc. d/b/a Assential Pumping. (Ex. "B", pg 6).

5. On February 1, 2006, the first disclaimer was sent by plaintiff, disclaiming coverage based upon a policy exclusion in the Businessowners Liability policy under subparagraph "g", relating to no coverage for bodily injury arising out of the use of an auto owned or operated by any insured. (Ex. "P"). However, Blakely Pumping, Inc., purchased a "Hired Auto and Non-Owned Auto Liability" endorsement with the Businessowners policy, and that endorsement deleted the exclusion under which plaintiff based its disclaimer. (Ex. "Q", pg 32).

6. On March 18, 2006, by letter from Alfred J. Mainetti, Esq., corporate attorney for Blakely Pumping, Inc., and on March 20, 2006, by letter of Paul J. Goldstein, Esq., attorney for the Slingerlands, NGM was sent the Amended pleadings. (Exs. "R" and "S").

7. On March 23, 2006, by letter of Wendy A. Tulowiecki, Senior Claims Representative, NGM disclaimed coverage, once again, based on the same exclusion in the Businessowners policy which was deleted by the "Hired Auto and Non-owned Auto Liability" endorsement. (Ex. "T").

8. The "Hired Auto and Non-Owned Auto Liability" endorsement changes the Businessowners policy as follows:

"B. For insurance provided by this endorsement only: 1. The exclusions, under the Businessowners Liability Coverage Form, Paragraph B.1. Applicable to Business Liability

Coverages, other than exclusions **a.**, **b.**, **d.**, **f.** and **I.** are deleted....” Exclusion g. was the exclusion under which plaintiff disclaimed.

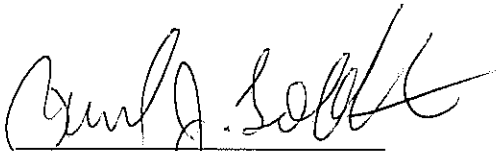
9. Therefore, the disclaimer was ineffective! On August 4, 2006, seven (7) months after plaintiff’s first notice of the facts of this accident, which it received in January, 2006, and after their time to answer the underlying lawsuit had expired, plaintiff, NGM disclaimed coverage based upon provisions in the “Hired Auto and Non-Owned Auto Liability” endorsement. (Ex. “V”).

10. It is submitted, in this application, and as further detailed in the Memorandum of Law, that the disclaimer was ineffective and too late for effective disclaimer. Further, that while under the policy provisions, there may be no coverage for Brian Blakely, there is coverage for Blakely Pumping, Inc., the named insured corporation.

11. Coverage is afforded to Blakely Pumping, Inc.! In the introduction to the Businessowners Liability Coverage Form, the “Named Insured shown in the Declarations” is referred to as “You” or “Your”. (Ex. “Q”, pg 8). In the “Hired Auto and Non-Owned Auto Liability” endorsement, section C. 3. “Non-Owned Auto” is defined as any auto **you** (emphasis supplied) do not own, lease, hire or borrow which is used in connection with **your** (emphasis supplied) business. Then there is some qualifying language if you are a partnership, which is not applicable in this case because “you” is a corporation. Thus, the Blakely motor vehicle is clearly a “non-owned auto”, as the corporation neither owned, leased, hired or borrowed the vehicle and it was being used in connection with the corporation’s business in going to a customer to assess a pump job.


12. Section A.2. “Non-owned Auto Liability” of the “Hired Auto and Non-Owned Auto Liability” endorsement states that the insurance applies to bodily injury arising out of the use of any “non-owned auto” in “your [the corporation’s] “business by any person other than you” [the corporation]. The 2004 Dodge Ram pickup driven by Brian Blakely, an employee of Blakely Pumping, Inc., on November 3, 2005, was a “non-owned auto” being used in the business of Blakely Pumping, Inc. When the vehicle caused bodily injury to Peter Slingerland arising out of the use of the auto in the business of Blakely Pumping, Inc., it was not being used by the corporation, but by Brian Blakely, who happened to also be an “executive officer” of the corporation. The policy does exclude coverage for Brian Blakely because he is an “executive officer” but does not exclude coverage for the corporation.

12. The disclaimer was ineffective and the policy provides coverage for this tragic accident, and therefore the Court should grant defendants, Slingerland, summary judgment and deny plaintiff summary judgment.


PAUL J. GOLDSTEIN

Sworn to before me this

7th day of April, 2008.


Notary Public

JEAN A. O'GORMAN
Notary Public, State of New York
Qualified in Dutchess County
Commission Expires 11-30-2010

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NGM INSURANCE COMPANY,

Plaintiff,

-against-

BLAKELY PUMPING, INC. d/b/a ASSENTIAL PUMPING,
BRIAN J. BLAKELY, PETER J. SLINGERLAND, NANCY
SLINGERLAND and PROGRESSIVE CASUALTY
INSURANCE COMPANY,

Defendants.
-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHESS)

AFFIDAVIT

Docket No. 07-CV-6517

Hon. Charles L. Bricant

PETER J. SLINGERLAND, being duly sworn, deposes and says:

1. I am one of the defendants in the above captioned action, and as such am fully familiar with this matter, and submit this affidavit in opposition to the motion for summary judgment of plaintiff, NGM Insurance Company, and in support of my motion and my wife's, Nancy Slingerland, for summary judgment. The facts alleged herein are based mostly upon what I have learned after my accident from my wife, healthcare providers, Brian Blakely, and the police accident reports, as I have no memory of the accident. As a result of the injuries sustained in the accident of November 3, 2005, I was rendered unconscious. My first memory is around Christmas, 2005. I have permanent brain damage which affects my ability to concentrate, to interact with other people, to communicate, to perform cognitive functions, to put words and sentences together, and such other kinds of activities.

2. I am 59 years old, being born July 23, 1948. I am married to Nancy Slingerland. I am presently a Human Resources Manager for Staff Line, Inc., Poughkeepsie, New York, the job I had prior to the accident. Although I am performing the same job, I do it much more slowly, with assistance, and am exhausted at the end of a day because of my having to overcompensate for my injuries.

3. On November 3, 2005, I was driving a 2003 Hyundai Sonata, on my way to work, which takes me on Route 28 in Kingston, New York. At the traffic light, at its intersection with Forrest Hill Drive, when the light changed from red to green, I proceeded into the intersection to make a left hand turn, while the vehicle of Brian J. Blakely, a 2004 Dodge Ram pickup, was traveling west on Route 28, proceeded through the red light striking my vehicle. The accident totaled my vehicle and rendered me unconscious. I was hospitalized at Westchester County Medical Center from November 3, 2005 to December 2, 2005. Thereafter, I went to the Taylor Care Center, at the Westchester County Medical Center, from December 2, 2005 to December 7, 2005. Thereafter, I went to Helen Hayes Hospital from December 7, 2005 to January 14, 2006, and I was an out-patient at Helen Hayes from January 19, 2006 to March 16, 2006.

4. Brian Blakely was insured by Progressive Insurance Company, who paid their full policy limit of \$25,000.

5. In my suit, pending in Ulster County Supreme Court, I have also sued Blakely Pumping, Inc., on the basis that they are liable because Mr. Blakely was in the course of his employment with them at the time of my accident. It is my understanding that plaintiff, NGM Insurance Company, has retained the law offices of Kelly & Meenagh, LLP, to defend Blakely Pumping, Inc. They have already deposed me in that action.

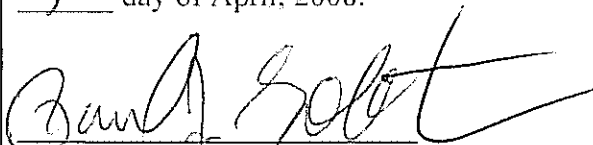
6. I respectfully request that the Court deny plaintiff's motion for summary judgment and grant my and my wife's application for summary judgment.



PETER J. SLINGERLAND

Sworn to before me this

3rd day of April, 2008.


Notary Public

PAUL J. GOLDSTEIN
Notary Public, State of New York
Qualified in Dutchess County
January 31, 2011
Goldstein & Metzger, LLP
40 Garden Street • Poughkeepsie, NY 12601 • (845) 473-7000
2

EXHIBIT 2

MV-104A (7/01)

DMV COPY

N
Only

Police ACCIDENT REPORT
MV-104A (7/01)

Local Codes
Accident#: UL-00708-05
Blotter#: UL-013974-05

☐ AMENDED REPORT

DMV COPY

Accident Date		Day of Week	Time	No. of Vehicles	No. Injured	No. Killed	Not Investigated at Scene	Left Scene	Police Photo's	
Month	Day	Year					<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
11	3	2005	Th	07:30	2	1	0			
VEHICLE 1					VEHICLE 2					<input type="checkbox"/> BICYCLIST <input type="checkbox"/> PEDESTRIAN <input type="checkbox"/> OTHER PEDESTRIAN
VEHICLE 1 - Driver					VEHICLE 2 - Driver					
License ID Number					License ID Number					State of Lic.
Driver Name-exactly as printed on license					Driver Name-exactly as printed on license					State of Lic.
Address(Included Number & Street)					Address(Included Number & Street)					Apt. No.
City or Town					City or Town					State Zip Code
Date of Birth					Date of Birth					
Month	Day	Year	Sex	Unlicensed	No. of Occup.	Public Property Damaged	Month	Day	Year	
0	0	0		<input type="checkbox"/>	0	<input type="checkbox"/>				
Name-exactly as printed on registration					Name-exactly as printed on registration					
Address(Include Number & Street)					Address(Include Number & Street)					Apt. No.
City or Town					City or Town					State Zip Code
Plate Number					Plate Number					State of Reg.
Veh Year & Make					Veh Year & Make					Veh Type
Ins. Code					Ins. Code					
Ticket/Arrest Number(s)					Ticket/Arrest Number(s)					
Violation Section(s)					Violation Section(s)					
Check if involved vehicle is:					Check if involved vehicle is:					
<input type="checkbox"/> more than 95 inches wide;					<input type="checkbox"/> more than 95 inches wide;					
<input type="checkbox"/> more than 34 feet long;					<input type="checkbox"/> more than 34 feet long;					
<input type="checkbox"/> operated with an overweight permit;					<input type="checkbox"/> operated with an overweight permit;					
<input type="checkbox"/> operated with an overdimension permit.					<input type="checkbox"/> operated with an overdimension permit.					
VEHICLE 1 DAMAGE CODES					VEHICLE 2 DAMAGE CODES					
Box 1-Point of Impact					Box 1-Point of Impact					
Box 2-Most Damage					Box 2-Most Damage					
Enter up to three more Damage Codes					Enter up to three more Damage Codes					
Vehicle By Towed:					Vehicle By Towed:					
To					To					
VEHICLE DAMAGE CODING:					VEHICLE DAMAGE CODING:					
1-13 See diagram on right.					1-13 See diagram on right.					
14. UNDERCARRIAGE					17. DEMOLISHED					
15. TRAILER					18. NO DAMAGE					
16. OVERTURNED					19. OTHER					
Reference Marker					Coordinates (if available)					
2 8					Longitude/Northing:					
8 6 0 1					074.02.561					
2 0 1 5					Latitude/Easting:					
					N41.56.953					
Place Where Accident Occurred:					Place Where Accident Occurred:					
County ULSTER					County ULSTER					
Road on which accident occurred					Road on which accident occurred					
STATE ROUTE 28					STATE ROUTE 28					
(Route Number or Street Name)					(Route Number or Street Name)					
at 1) Intersecting Street FOREST HILL DR					at 1) Intersecting Street FOREST HILL DR					
at 2)					at 2)					
Feet Miles					Feet Miles					
N E S W of					N E S W of					
(Route Number or Street Name)					(Route Number or Street Name)					
Accident Description/Officer's Notes					Accident Description/Officer's Notes					
Note: Traffic signal checked by #121 and observed to be working properly. There were no skid marks at scene made by vehicle# 1 prior to impact. Operator of Vehicle #1 advised that he was driving in the right lane and did not see traffic signal because of the sun shining on it, and did not see vehicle #2 until the last second.					Note: Traffic signal checked by #121 and observed to be working properly. There were no skid marks at scene made by vehicle# 1 prior to impact. Operator of Vehicle #1 advised that he was driving in the right lane and did not see traffic signal because of the sun shining on it, and did not see vehicle #2 until the last second.					
Witnesses: John Reynaud 845-657-5763, Paul Newsome 845-339-1959. All witnesses verify that traffic light was green on					Witnesses: John Reynaud 845-657-5763, Paul Newsome 845-339-1959. All witnesses verify that traffic light was green on					
8 9 10 11 12 13 14 15 16 17 BY TO 18					8 9 10 11 12 13 14 15 16 17 BY TO 18					
Names of all involved					Names of all involved					
Date of Death Only					Date of Death Only					
Officer's Rank and Signature					Officer's Rank and Signature					
Print Name SGT DONALD K ROEPFEN					Print Name SGT DONALD K ROEPFEN					
Badge/No 105					Badge/No 105					
NCIC No. NY0559500					NCIC No. NY0559500					
Precinct/Post Troop/Zone					Precinct/Post Troop/Zone					
Station/Beat/Seactor					Station/Beat/Seactor					
Reviewing Officer					Reviewing Officer					
Date/Time Reviewed					Date/Time Reviewed					
11.4.07.20					11.4.07.20					

New York State Department of Motor Vehicles

POLICE ACCIDENT REPORT

MV-104A (7/01)

DMV COPY

Local Codes

Accident#: UL-00708-05

Blotter#: UL-013974-05

☐ AMENDED REPORT

Accident Date		Month	Day	Year	Day of Week	Time	No. of Vehicles	No. Injured	No. Killed	Not Investigated at Scene	Left Scene	Police Photo's
		11	3	2005	Th	07:30	2	1	0	Accident Reconstructed		<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

VEHICLE 1

VEHICLE 2

BICYCLIST

PEDESTRIAN

OTHER PEDESTRIAN

VEHICLE 1 - Driver	State of Lic.	VEHICLE 2 - Driver	State of Lic.
License ID Number		License ID Number	
Driver Name-exactly as printed on license		Driver Name-exactly as printed on license	

Address(Included Number & Street)	Apt. No.	Address(Included Number & Street)	Apt. No.
City or Town	State	City or Town	State
Zip Code		Zip Code	

Date of Birth	Sex	Unlicensed	No. of Occup.	Public Property Damaged	Date of Birth	Sex	Unlicensed	No. of Occup.	Public Property Damaged
Month					Month				
Day					Day				
Year					Year				

Name-exactly as printed on registration	Sex	Date of Birth	Name-exactly as printed on registration	Sex	Date of Birth
		Month			Month
		Day			Day
		Year			Year

Address(Included Number & Street)	Apt. No.	Haz. Mat. Code	Released	Address(Included Number & Street)	Apt. No.	Haz. Mat. Code	Released
City or Town	State	Zip Code		City or Town	State	Zip Code	

Plate Number	State of Reg.	Veh Year & Make	Veh Type	Ins. Code	Plate Number	State of Reg.	Veh Year & Make	Veh Type	Ins. Code

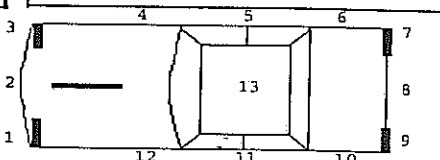
Ticket/Arrest Number(s)	Ticket/Arrest Number(s)
Violation Section(s)	Violation Section(s)

Check if involved vehicle is:	Check if involved vehicle is:	Check the diagram below that describes the accident or draw your own diagram in the space provided(9). Number the vehicles.
<input type="checkbox"/> more than 95 inches wide;	<input type="checkbox"/> more than 95 inches wide;	
<input type="checkbox"/> more than 34 feet long;	<input type="checkbox"/> more than 34 feet long;	
<input type="checkbox"/> operated with an overweight permit;	<input type="checkbox"/> operated with an overweight permit;	
<input type="checkbox"/> operated with an overdimension permit.	<input type="checkbox"/> operated with an overdimension permit.	

VEHICLE 1 DAMAGE CODES	VEHICLE 2 DAMAGE CODES	ACCIDENT DIAGRAM
Box 1-Point of Impact	Box 1-Point of Impact	
Box 2-Most Damage	Box 2-Most Damage	
Enter up to three more Damage Codes	Enter up to three more Damage Codes	
Vehicle By	Vehicle By	
Towed: To	Towed: To	

VEHICLE DAMAGE CODING:

- 1-13 See diagram on right.
 14. UNDERCARRIAGE
 15. TRAILER
 16. OVERTURNED
 17. DEMOLISHED
 18. NO DAMAGE
 19. OTHER



Cost of repairs to any one vehicle will be more than \$1000.
☐ Unknown/Unable to Determine ☒ Yes ☐ No

Reference Marker	Coordinates (if available)	Place Where Accident Occurred:
2 8	Longitude/Northing:	County <u>ULSTER</u> <input type="checkbox"/> City <input type="checkbox"/> Village <input checked="" type="checkbox"/> Town of <u>ULSTER</u>
8 6 0 1	074.02.561	Road on which accident occurred <u>STATE ROUTE 28</u>
2 0 1 5	Latitude/Easting:	(Route Number or Street Name)
	N41.56.953	at 1) Intersecting Street <u>FOREST HILL DR</u>
		(Route Number or Street Name)
		at 2) <input type="checkbox"/> N <input type="checkbox"/> E <input type="checkbox"/> S <input type="checkbox"/> W of <u></u>
		(Route Number or Street Name)

Accident Description/Officer's Notes
Forrest Hill Drive and Red on Route 28. Photo's taken by Det. Sgt. McCrindle.

8	9	10	11	12	13	14	15	16	17 BY	TO 18	Names of all involved	Date of Death Only
A	-	-	-	-	-	-	-	-	-	-		
B	-	-	-	-	-	-	-	-	-	-		
C	-	-	-	-	-	-	-	-	-	-		
D	-	-	-	-	-	-	-	-	-	-		
E	-	-	-	-	-	-	-	-	-	-		
F	-	-	-	-	-	-	-	-	-	-		

Officer's Rank and Signature	Badge/No	NCIC No.	Precinct/Post Troop/Zone	Station/Beat/Seactor	Reviewing Officer	Date/Time Reviewed
Print Name SGT. DONALD K KOEPPEN	105	NY0559500				11-04-05 1200

PEDESTRIAN/BICYCLIST/OTHER PEDESTRIAN LOCATION		APPARENT CONTRIBUTING FACTORS		Vehicular	
1. Pedestrian/Bicyclist/Other Pedestrian at Intersection 2. Pedestrian/Bicyclist/Other Pedestrian Not at Intersection		Human 2. Alcohol Involvement 3. Backing Unsafely 4. Driver Inattention/Distracted* 5. Driver Inexperience* 6. Drugs (Illegal) 7. Failure to Yield Right-of-Way 27. Failure to Keep Right 21. Fatigued/Drowsy 8. Fell Asleep 9. Following Too Closely 10. Illness 11. Lost Consciousness 12. Passenger Distraction 13. Passing or Lane Usage Improper 14. Pedestrian/Bicyclist/Other Pedestrian Error/Confusion 15. Physical Disability 16. Prescription Medication 17. Traffic Control Disregarded 18. Turning Improperly 19. Unsafe Speed 20. Unsafe Lane Changing 22. Cell Phone (hand-held) 23. Cell Phone (hands-free) 24. Other Electronic Device* 25. Outside Car Distraction* 26. Reaction to Other Uninvolved Vehicle 28. Aggressive Driving/Road Rage		41. Accelerator Defective 42. Brakes Defective 43. Headlights Defective 44. Other Lighting Defects 45. Oversized Vehicle 46. Steering Failure 47. Tire Failure/Inadequate 48. Tow Hitch Defective 49. Windshield Inadequate 50. Driverless/Runaway Vehicle 60. Other Vehicular* Environmental 61. Animal's Action 62. Glare 63. Lane Marking Improper/Inadequate 64. Obstruction/Debris 65. Pavement Defective 66. Pavement Slippery 67. Shoulders Defective/Improper 68. Traffic Control Device Improper/Non-Working 69. View Obstructed/Limited	
PEDESTRIAN/BICYCLIST/OTHER PEDESTRIAN ACTION 1. Crossing, With Signal 2. Crossing, Against Signal 3. Crossing, No Signal, Marked Crosswalk 4. Crossing, No Signal or Crosswalk 5. Riding/Walking/Skating Along Highway With Traffic 6. Riding/Walking/Skating Along Highway Against Traffic 7. Emerging from in Front of/Behind Parked Vehicle 8. Going to/From Stopped School Bus 9. Getting On/Off Vehicle Other Than School Bus 11. Working in Roadway 12. Playing in Roadway 13. Other Actions in Roadway* 14. Not in Roadway (Indicate)*		TRAFFIC CONTROL 1. None 2. Traffic Signal 3. Stop Sign 4. Flashing Light 5. Yield Sign 6. Officer/Guard 7. No Passing Zone 8. RR Crossing Sign 9. RR Crossing Flashing Light 10. RR Crossing Gates 11. Stopped School Bus-Red Lights Flashing 12. Construction Work Area 13. Maintenance Work Area 14. Utility Work Area 15. Police/Fire Emergency 16. School Zone 20. Other*		DIRECTION OF VEHICLE: 	
LIGHT CONDITIONS 1. Daylight 2. Dawn 3. Dusk 4. Dark-Road Lighted 5. Dark-Road Unlighted		ROADWAY CHARACTER 1. Straight and Level 2. Straight and Grade 3. Straight at Hillcrest 4. Curve and Level 5. Curve and Grade 6. Curve at Hillcrest		PRE-ACCIDENT VEHICLE ACTION 1. Going Straight Ahead 2. Making Right Turn 16. Making Right Turn on Red 3. Making Left Turn 17. Making Left Turn on Red 4. Making U Turn 5. Starting from Parking 6. Starting in Traffic 7. Slowing or Stopping 8. Stopped in Traffic 9. Entering Parked Position 10. Parked 11. Avoiding Object in Roadway 12. Changing Lanes 13. Passing 14. Merging 15. Backing 16. Police Pursuit 20. Other*	
ROADWAY SURFACE CONDITION 1. Dry 2. Wet 3. Muddy 4. Snow/Ice 5. Slush 6. Flooded 0. Other*		WEATHER 1. Clear 2. Cloudy 3. Rain 4. Snow 5. Sleet/Hail/Freezing Rain 6. Fog/Smog/Smoke 0. Other*		LOCATION OF MOST SEVERE PHYSICAL COMPLAINT 1. Head 2. Face 3. Eye 4. Neck 5. Chest 6. Back 7. Shoulder-Upper Arm 8. Elbow-Lower Arm-Hand 9. Abdomen - Pelvis 10. Hip-Upper Leg 11. Knee-Lower Leg-Foot 12. Entire Body	
WHICH VEHICLE OCCUPIED 1. Vehicle No. 1 A. All-Terrain Vehicle (ATV) O. Other* 2. Vehicle No. 2 B. Bicyclist P. Pedestrian I. In-Line Skater S. Snowmobiler		POSITION IN/ON VEHICLE 1. Driver 2-7. Passengers 8. Riding/Hanging on Outside		LOCATION OF FIRST EVENT 1. On Roadway 2. Off Roadway	
SAFETY EQUIPMENT USED 1. None 2. Lap Belt 3. Harness 4. Lap Belt/Harness 5. Child Restraint Only 6. Helmet (Motorcycle Only) 7. Air Bag Deployed 8. Air Bag Deployed/Lap Belt 9. Air Bag Deployed/Harness A. Air Bag Deployed/Lap Belt/Harness B. Air Bag Deployed/Child Restraint		TYPE OF PHYSICAL COMPLAINT 1. Amputation 2. Concussion 3. Internal 4. Minor Bleeding 5. Severe Bleeding 6. Minor Burn 7. Moderate Burn 8. Severe Burn 9. Fracture - Dislocation 10. Contusion - Bruise 11. Abrasion 12. Complaint of Pain 13. None Visible 14. Whiplash		TYPE OF ACCIDENT -- COLLISION WITH 1. Other Motor Vehicle 6. In-Line Skater 2. Pedestrian 7. Deer 3. Bicyclist 8. Other Pedestrian 4. Animal 10. Other Object (Not Fixed)* 5. Railroad Train	
IN-LINE SKATER/BICYCLIST C. Helmet Only D. Helmet/Other E. Pads Only F. Stoppers Only 0. Other*		EJECTION FROM VEHICLE 1. Not Ejected 2. Partially Ejected 3. Ejected		COLLISION WITH FIXED OBJECT 11. Light Support/Utility Pole 12. Guide Rail-Not At End 25. Guide Rail-End 13. Crash Cushion 14. Sign Post 15. Tree 16. Building/Wall 17. Curbing 18. Fence 19. Bridge Structure 20. Culvert/Head Wall 21. Median-Not At End 26. Median-End 27. Barrier 22. Snow Embankment 23. Earth Embankment/Rock Cut/Ditch 24. Fire Hydrant 30. Other Fixed Object*	
AGE 11		SEX M/F		NO COLLISION 31. Overturned 32. Fire/Explosion 33. Submersion 34. Ran Off Roadway Only 40. Other*	
INJURED TAKEN 17 BY TO 18		VICTIM'S PHYSICAL AND EMOTIONAL STATUS 1. Apparent Death 2. Unconscious 3. Semiconscious 4. Incoherent 5. Shock 6. Conscious		COVER SHEET N	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NGM INSURANCE COMPANY,

Plaintiff,

-against-

RESPONSE TO
STATEMENT OF
UNDISPUTED FACTS
OF PLAINTIFF, NGM
INSURANCE COMPANY

BLAKELY PUMPING, INC. d/b/a ASSENTIAL PUMPING,
BRIAN J. BLAKELY, PETER J. SLINGERLAND, NANCY
SLINGERLAND and PROGRESSIVE CASUALTY
INSURANCE COMPANY,

Defendants.
-----X

Civil Action No.
07-CV-6517

Pursuant to Local Rule 56.1, defendants, PETER J. SLINGERLAND and NANCY SLINGERLAND, by their attorneys, GOLDSTEIN & METZGER, LLP, submit the following response to plaintiff, NGM Insurance Company's statement of undisputed facts:

1. Plaintiff admits those statements contained in paragraphs 1-3, 5-7, 9-10, 12, and 16.
2. With respect to paragraph 4 - defendants admit each portion of the paragraph, except that the 2004 Dodge was operated by Brian J. Blakely as an employee of Blakely Pumping, Inc., not in his capacity as an officer. (See Ex. "G", pgs 4-5, 16).
3. With respect to paragraph 8 - defendants admit each portion of the paragraph, except as to whether coverage for automobiles owned by executive officers of Blakely Pumping, Inc., are provided under the circumstances of this case, is a question for the Court to decide.
4. With respect to paragraph 11 - defendants admit each portion of the paragraph, except that the denial of coverage, as contained in NGM's disclaimer of February 1, 2006, under the Business Liability Policy, was not based upon the ground the automobile accident arose from the Vice President of Blakely Pumping, Inc. using his own vehicle in connection with the business, but upon the Exclusion contained in the Businessowners Liability Coverage form, which states that the insurance does not apply to bodily injury arising out of the use of an auto owned or operated by any insured. (See Ex. "P").

5. With respect to paragraph 13 - defendants deny that portion that states that the First Request for Coverage as a Non-Owned Vehicle was Mr. Goldstein's letter of July 24, 2006. The First Request for Coverage as a Non-Owned Vehicle was Mr. Mainetti's letter to National Grange Mutual on January 3, 2006. (Ex. "P").

6. With respect to paragraph 14 - defendants deny so much of the paragraph which suggests NGM's response was timely and that the language of the endorsement, "Hired Auto and Non-Owned Auto Liability", is clear and affords no coverage in this case. (Ex. "V")

7. With respect to paragraph 15 - defendants admit each portion of the paragraph, except deny that portion which states that NGM's letter of August 4, 2006, clearly explains that under the "Hired Auto and Non-Owned Auto Liability" endorsement, there is no coverage due to the circumstances surrounding Mr. Slingerland's accident. (Ex. "V").

**Defendants, Peter J. Slingerland and Nancy Slingerland,
Additional Statement of Material Facts**

8. **Blakely Pumping, Inc.'s One Employee.** Blakely Pumping, Inc. had no employees except Brian Blakely. (Ex."G", pg. 5, 12).

9. **Blakely Pumping, Inc. purchased Non-Owned Auto Liability Coverage.** Blakely Pumping, Inc., purchased at the same time it purchased the Businessowners Liability Coverage Form, BP00 06 0197 , from plaintiff, NGM, a "Hired Auto and Non-Owned Auto Liability-New York" endorsement, paying an additional premium for this coverage.
(Ex. "Q", pgs 1-2, 8, 32)

10. **Blakely Pumping, Inc. was the Named Insured shown in the Declarations.** Blakely Pumping, Inc. is the Named Insured shown in the Declarations. Although the Declarations actually names "Assential Pumping, Inc.", the name of the corporation was Blakely Pumping, Inc. d/b/a Assential Pumping. No issue has been made that the Named Insured is actually Blakely Pumping, Inc. (Ex. "Q", pg 1).

11. **Amendment of Pleading adding Blakely Pumping, Inc.** On February 9, 2006, defendants, Peter J. Slingerland and Nancy Slingerland, amended their Summons and Verified Complaint to add as a defendant, Blakely Pumping, Inc. d/b/a Assential Pumping, as a defendant in the underlying bodily injury action. (Ex. "B").

12. **Notice to NGM of Amended Pleading adding Blakely Pumping, Inc.** On March 18, 2006, Alfred B. Mainetti, Esq., attorney for the corporation, and on March 20, 2006, Paul J. Goldstein, Esq., sent the Amended pleading adding Blakely Pumping, Inc. in the underlying lawsuit, to plaintiff, NGM. (Exhibits "R" and "S").

13. **Disclaimer Under Wrong Policy.** On March 23, 2006, by letter of Wendy A. Tulowiecki, Senior Claim Representative, NGM, once again, disclaimed coverage for Blakely Pumping, Inc., based under the auto exclusion in Blakely Pumping, Inc.'s, Businessowners Liability Coverage Form, exclusion "g. Aircraft, Auto or Watercraft". (Exs. "T", "Q", pg 11).

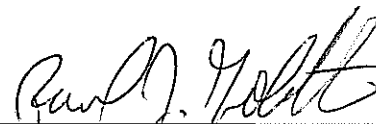
14. **"Hired Auto and Non-Owned Auto Liability" Form deletes Exclusion.** The "Hired Auto and Non-Owned Auto Liability " Form, which was in effect for Blakely Pumping, Inc., at the time of the November 3, 2005, accident, deletes exclusion "g" from the Businessowners Liability Coverage Form.

15. **August 4, 2006 was the first time NGM disclaimed based on the Hired Auto and Non-Owned Auto endorsement.** On August 4, 2006, plaintiff, NGM, by letter from Wendy A. Tulowiecki, Senior Claim Representative, disclaimed coverage, for the first time, based upon the "Hired Auto and Non-Owned Auto" endorsement. (Ex. "V").

Dated: Poughkeepsie, New York
April 7, 2008

GOLDSTEIN & METZGER, LLP
Attorneys for Defendants, *Peter J.
Slingerland and Nancy Slingerland*

By



Paul J. Goldstein, Esq. (9722)
40 Garden Street
Poughkeepsie, NY 12601
Tel. 845/473-7000

- TO: BRILL & ASSOCIATES, P.C.
Attorneys for Plaintiff
111 John Street, Suite 1070
New York, NY 10038
- TO: COOK, NETTER, CLOONAN, KURTZ & MURPHY, P.C.
Attorneys for Blakely Pumping, Inc. d/b/a Assential Pumping, Inc, and Brian J. Blakely
85 Main Street
Kingston, NY 12402
- TO: PROGRESSIVE CASUALTY INSURANCE COMPANY
c/o New York State Superintendent of Insurance
25 Beaver Street
New York, NY 10006

Re: NGM INSURANCE COMPANY
v.
BLAKELY PUMPING, INC. d/b/a ASSENTIAL PUMPING, et al.
Docket No. 07-CV-6517

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHESS)

Kendra Knobloch, being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age and reside at Hyde Park, NY,

On April 8, 2008, I served the following:

**CROSS-NOTICE OF MOTION FOR SUMMARY JUDGMENT;
AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF CROSS-NOTICE OF MOTION
FOR SUMMARY JUDGMENT, WITH ACCOMPANYING
MEMORANDUM OF LAW AND EXHIBITS; RESPONSE TO
STATEMENT OF UNDISPUTED FACTS;**

by filing the same via ECF to:

BRILL & ASSOCIATES, P.C.
Attorneys for Plaintiff
111 John Street, Suite 1070
New York, NY 10038

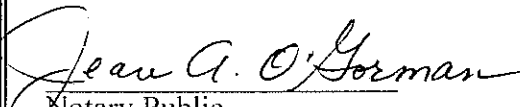
COOK, NETTER, CLOONAN, KURTZ & MURPHY, P.C.
Attorneys for Blakely Pumping, Inc. d/b/a Assential Pumping, Inc.
and Brian J. Blakely
85 Main Street, PO Box 3939
Kingston, NY 12402

PROGRESSIVE CASUALTY INSURANCE COMPANY
c/o New York State Superintendent of Insurance
25 Beaver Street
New York, NY 10006


KENDRA KNOBLOCH

Sworn to before me this

8th day of April, 2008


Notary Public

JEAN A. O'GORMAN
Notary Public, State of New York
Qualified in Dutchess County
Commission Expires 11-30-2010

Goldstein & Metzger, LLP

40 Garden Street • Poughkeepsie, NY 12601 • (845) 473-7000

NGM INSURANCE COMPANY,

Plaintiff,

-against-

Docket No. 07-CV-6517

BLAKELY PUMPING, INC. d/b/a ASSENTIAL PUMPING,
BRIAN J. BLAKELY, PETER J. SLINGERLAND, NANCY
SLINGERLAND and PROGRESSIVE CASUALTY
INSURANCE COMPANY,

Hon. Charles L. Bricant

Defendants.

**CROSS-NOTICE OF MOTION FOR SUMMARY JUDGMENT;
AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR
SUMMARY JUDGMENT;
RESPONSE TO STATEMENT OF UNDISPUTED FACTS**

GOLDSTEIN & METZGER, LLP

Attorneys for Defendants, Peter J. Slingerland and Nancy Slingerland

40 GARDEN STREET
POUGHKEEPSIE, NEW YORK 12601
(845) 473-7000

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney duly admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: April 7, 2008

Signature

Print Signer's Name: Paul J. Goldstein, Esq.

Service of a copy of the within

is hereby admitted.

Dated:

Attorney(s) for

PLEASE TAKE NOTICE

☐ that the within is a (certified) true copy of a(n)
NOTICE OF entered in the office of the clerk of the within named Court
ENTRY on 2007

☐ that an Order of which the within is a true copy will be presented for settlement to
NOTICE OF the Hon. one of the judges of the
SETTLEMENT within named Court at
on 2007, at M.

Dated:

GOLDSTEIN & METZGER, LLP

Attorneys for Defendants, Slingerland
40 GARDEN STREET
POUGHKEEPSIE, NEW YORK 1260
(845) 473-7000